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Supreme Court, U.S.
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No. (D)

IN THE
SUPREME COURT OF THE UNITED STATES

OZ GAS, LTD,
Petitioner

vs.

WARREN AREA SCHOOL DISTRICT, WARREN COUNTY, TRIUMPH TOWNSHIP AND DEERFIELD TOWNSHIP, and FOREST COUNTY AREA SCHOOL DISTRICT,
Respondents

# PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

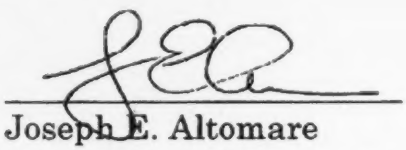
Propriety of Selective Prospectivity In Matters Purely Of State Law

Does the Fourteenth Amendment to the United States Constitution prohibit a state court from employing selective prospectivity in determining the reach of a rule changing decision in matters purely of state law ?

**Rule 29.6**

**CORPORATE DISCLOSURE STATEMENT**

The Petitioner, Oz Gas, Ltd., has no parent nor publicly held company owning 10% or more of its partnership equity.



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## CITATIONS OF OPINIONS

1. Pennsylvania Supreme Court

The opinion of the Supreme Court of Pennsylvania from which Petitioner seeks to appeal is reported at *Oz Gas, Ltd. v. Warren Area School District, et al*, ___ Pa. ____; 938 A.2d 274; 2007 Pa. LEXIS 2882, and is reprinted in the Appendix hereto at p. A-2.

2. Pennsylvania Commonwealth Court

(intermediate appellate court)

The opinion of the Commonwealth Court of Pennsylvania is reported at *Oz Gas, Ltd. v. Warren Area School District, et al*, ___ Pa. Commonwealth Court ____; 886 A.2d 336; 2005 Pa. Commw. LEXIS 686, and is reprinted in the Appendix hereto at p. A-26.

2. Common Pleas Court of Warren County Pennsylvania

(trial court)

The opinion of the Common Pleas Court of Warren County Pennsylvania is reported at *Oz Gas, Ltd. v. Warren Area School District, et al*, ____ Pa. D. & C. 4th ____; 2004 Pa. Dist. & Cnty. Dec. LEXIS 343, and is reprinted in the Appendix hereto at p. A-31.

## STATEMENT OF JURISDICTION

Petitioner seeks review of the Order of the Supreme Court of Pennsylvania entered in these proceeding on December 27, 2007.

The jurisdiction of the Court is invoked pursuant to 28 USCS § 1257

## CONSTITUTIONAL PROVISIONS INVOLVED

Amendment 14, § 1, of the Constitution of the United States:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

## STATEMENT OF THE CASE

Until the announcement by the Pennsylvania Supreme Court of its decision in *Independent Oil & Gas Association of Pennsylvania v. Board of Assessment Appeals of Fayette County*, 572 Pa. 240, 814 A.2d 180 (2002), the *ad valorem* taxation of oil and gas estates had for many years been the source of significant revenue for local governments and schools in the oil and gas rich counties of the state. This all abruptly changed when the court in *Independent Oil* ruled that the state's local tax enabling statute did not authorize the separate taxation of oil and gas. Moreover, the court specifically held that the assessments from which the plaintiffs there before it had appealed were invalid, thus affording those plaintiffs the benefit of the new rule which the case established.

The statute under which the tax had been assessed provides that when a tax is declared invalid by a court, a taxpayer is upon demand entitled to a refund of tax actually paid within three years preceding such demand, and that the taxpayer is entitled to proceed by action in assumpsit to enforce payment of that refund (72 P.S. §5566b and §5566c)

Petitioner Oz Gas, Ltd ("Oz"), having for many years preceding *Independent Oil* paid to the local tax authorities (the "Tax Districts") many hundreds of

thousands of dollars in tax levied on its oil and gas holdings, commenced a refund action against them.

After the pleadings were closed, the parties filed cross motions for summary judgment wherein the Tax Districts contended that the announcement of the new rule in *Independent Oil* should not, under *Chevron Oil Co. v. Huson*, 404 U.S. 97, 30 L. Ed. 2d 296, 92 S. Ct. 349 (1971), be accorded retroactive affect, and because it could not, Oz's refund claim should fail. Oz argued to the contrary that *Chevron* did not apply because once a court applies a new rule of law for the benefit of the litigants before it (as was done in *Independent Oil*), it cannot thereafter withhold the application of that new rule from other litigants without violating the equal protection and due process "*...principle that litigants in similar situations should be treated the same....*" *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 at 534; 111 S. Ct. 2439; 115 L. Ed. 2d 481 (1991). [App. p. A-73 et seq. (excerpted Oz Brief in Support of Summary Judgment) ].

The trial court rejected Oz's argument and granted summary judgment to the Tax Districts on the grounds that *Chevron, supra,* whose principles had long standing in Pennsylvania jurisprudence, was not only controlling, but that its application in the case required the conclusion that *Independent Oil* did not qualify for retroactive application. Because it did not, the trial court held that the Statute was inoperable as to Oz and entered judgment for the Tax Districts. [App. p. A-31 et seq. (trial court opinion) ].

On appeal as of right to the Commonwealth Court (the intermediate appellate court), Oz raised, among other issues, the same constitutional issues it had raised in the trial court [App. p. A-58 et seq. (excerpted Oz Principal Brief) and App. p. A-65 et seq. (excerpted Oz Reply Brief)]. The Commonwealth Court reversed the trial court in an *en banc* decision, but decided the case on statutory rather than constitutional grounds and never reached the constitutional issues presented by Oz [App. p. A-26 et seq. (intermediate appellate opinion) ].

The Pennsylvania Supreme Court granted Certiorari, and Oz once again raised the equal protection issue [App. p. A-50 et seq. (excerpted Oz Principal Brief) ].

The court reversed the intermediate appellate court, opining that the trial court was correct both that *Chevron* was controlling, and that its application in the case required the conclusion that *Independent Oil* did not qualify for retroactive affect. In so ruling, it also eschewed any analysis of the federal constitutional issues raised by Oz [App. p. A-2 et seq. (Pa. Supreme Ct. Opinion)].

## ARGUMENT

The plurality decision of this High Court in *Beam, supra*, abandoned selective prospectivity as an option in determining the reach of a judicial decision announcing a new rule of law on the equal protection and due process grounds "... *that litigants in similar situations should be treated the same...*" *Id.*, 501 U.S. 529 at 534. In *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 97, 125 L. Ed. 2d 74, 113 S. Ct. 2510 (1993), a majority of this Court made clear that *Beam*'s reach extended to state courts, at least where the question was the retroactivity of a change in substantive federal law, saying through Justice Thomas:

> *Beam controls this case, and we accordingly adopt a rule that fairly reflects the position of a majority of Justices in Beam: When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.*

*Harper, supra*, 509 U.S. at 97.

The fact nevertheless remains that the seminal principle on which *Beam* was decided implicates the federal constitutional rights of equal protection and

due process, protections which reach, by way of the Fourteenth Amendment, beyond the case-bound constraints of *Beam* and *Harper* (which only addressed changes in federal law), to questions involving changes in purely state law as well.

Since *Harper*, this Court has had no occasion to squarely consider whether state courts are, for the same reasons explained in *Beam*, compelled to discard the practice of employing selective prospectivity to rule changing cases involving matters of purely state law. As a result, the courts of the states are in disarray on the issue. The courts of New Hampshire (see, *Estate of Ireland v. Worcester Insurance Company*, 149 N.H. 656; 826 A.2d 577; 2003 N.H. LEXIS 95), South Dakota (see, *Burgard v. Benedictine Living Communities*, 2004 SD 58; 680 N.W.2d 296; 2004 S.D. LEXIS 65), West Virginia (see *Adkins v. Cline*, 216 W. Va. 504; 607 S.E.2d 833; 2004 W. Va. LEXIS 200), and Washington (see, *Lunsford v. Saberhagen Holdings, Inc.*, 139 Wn. App. 334; 160 P.3d 1089; 2007 Wash. App. LEXIS 1727) have all adopted the principles of *Beam* and have abandoned the use of selective prospectivity. Some have even made the logical connection between *Beam* and the growing proclivity of many courts to issue "unpublished" opinions. See e.g., *Schmier v. Supreme Court*, 96 Cal. App. 4th 873 (Cal. Ct. App. 2002) in which the Fourteenth Amendment implications of *Beam* were weighed in determining the propriety of withholding publication of an appellate decision.

The remainder, including Pennsylvania's high court, cling to the notion that they are, under *Beam* and *Harper* only compelled to discard selective

prospectivity when dealing with federal questions. In making this distinction, they often rely on the words of Justice Thomas, speaking for the majority in *Harper*, that:

> *Whatever freedom state courts may enjoy to limit the retroactive operation of their own interpretations of state law,* [citation omitted], *cannot extend to their interpretations of federal law.*

*Harper, supra,* 509 U.S. at 100.

But the allusion in this passage to the prerogatives of state courts with respect to issues of state law was certainly not meant to license selective prospectivity on state questions. That issue was plainly not before the Court, and no elucidation of what the limits of those prerogatives might be is made elsewhere in *Harper*. Plainly, that passage was simply meant to better and more precisely narrow the issue which *was* at hand in *Harper* – the obligation of state courts under the Supremacy Clause to follow the rules established by federal courts on federal questions.

Notwithstanding this, state courts which have not adopted *Beam* and *Harper* for state law matters make eminently clear (usually in counter- distinction to their compulsion in the case at hand) that *but for* the presence of a federal question, neither of those cases would apply. In *Annenberg v. Commonwealth*, for example (562 Pa. 581; 757 A.2d 338; 2000 Pa.

LEXIS 1381) the Pennsylvania Supreme Court, in explaining why it could not there apply *Chevron, supra*, said:

> ... *The* [United States Supreme] *Court stated that where the "court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule." Harper, 509 U.S. at 97. As the rule announced in the United States Supreme Court's decision in Fulton controls this matter and there is no question that the Supreme Court applied Fulton to the parties before it, pursuant to Harper, we, too, must apply the Fulton rule retroactively.*
>
> ***... Whatever freedom state courts may enjoy to limit the retroactive operation of their own interpretations of state law ... cannot extend to their interpretations of federal law."*** *Harper, 509 U.S. at 86, 100 (citations omitted). This matter involves the Commerce Clause of the United States Constitution, which is clearly an issue of federal law.* ***Thus, we are compelled to apply the Harper rule of retroactivity.***

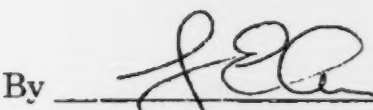
*Id.*, 562 Pa. at 603, 757 A.2d 351 [counsel's emphasis]

## CONCLUSION

Because they are limited to federal law, *Beam* and *Harper* are narrow precedent which, despite their Fifth Amendment foundations, and Fourteenth Amendment implications, have been distinguished as inapplicable by the majority of state courts where rule changing cases involve solely matters of state law.

This Petition presents an opportunity to address precisely the question which *Harper* quite properly left for another day, namely, and as framed by the passage discussed above: "*Whatever freedom state courts may enjoy to limit the retroactive operation of their own interpretations of state law...,*" does it include the prerogative to engage in selective prospectivity without violating the Fourteenth Amendment?

Respectfully submitted,

By 

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